

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CURTIS PERRY	:	CIVIL ACTION
	:	
v.	:	
	:	
DONALD T. VAUGHN, et al.	:	NO. 02-00839

MEMORANDUM AND ORDER

Fullam, Sr. J.

May , 2004

This habeas corpus case has a protracted history, unfortunately devoted almost exclusively to whether petitioner's claims are time-barred. The magistrate judge to whom the case was referred for report and recommendation initially recommended summary dismissal on limitations grounds. However, that ruling was issued *sua sponte*, before the respondent had filed a response to the petition. At about the same time the magistrate's report was filed, the Third Circuit Court of Appeals decided Robinson v. Johnson, 283 F.3d 581, 2002 WL 377928 (3d Cir. 2002), which held that the one-year limitations period prescribed by the ADEPA, 28 U.S.C. § 2244, gives rise to an affirmative defense which must be raised by the respondent, and which may be waived. By Memorandum and Order dated June 17, 2002, I re-referred the case to the magistrate judge for further proceedings. The magistrate judge then appointed counsel for the petitioner, and directed the respondent and the Philadelphia District Attorney to respond to the petition.

In their joint response, the respondents did not address the merits of the petition, but asserted that the petition was untimely.

After extensive briefing, the magistrate judge has now filed a very thorough report, again recommending that the petition be dismissed as untimely. Petitioner's counsel has filed objections to the magistrate's report, and the petitioner himself has filed *pro se* objections. The respondents have filed a "consolidated response" to these objections. Petitioner has filed a reply to that response, and respondents have filed a sur-reply.

Petitioner's judgment of conviction became final in early 1995, after the Pennsylvania Supreme Court denied his request for allowance of appeal. See Commonwealth v. Perry, 653 A.2d 1229 (Pa. 1994)(table). Petitioner filed a PCRA petition on May 9, 1997. The petition was dismissed as untimely. On appeal from that decision, the Pennsylvania Superior Court remanded the case to the trial court for further proceedings. The petition was again denied, on January 22, 2001, and that decision was affirmed by the Pennsylvania Superior Court on December 30, 2001. On February 19, 2002, petitioner filed the petition now before this court.

Since petitioner's judgment of conviction became final before the effective date of the AEDPA, April 24, 1996, he was

required to file his federal habeas corpus by April 24, 1997, unless the limitations period is tolled. Under the statute, "the time during which a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2). Unfortunately for the petitioner, he did not file his PCRA petition until May 9, 1997, more than one year after the effective date of the AEDPA. Thus, the statutory provision for tolling is no help to petitioner, since his time for filing in federal court had already expired. Moreover, since the state courts ultimately rejected his PCRA application as untimely, it does not constitute "a properly filed application for state conviction or other collateral review," see, e.g., Fahy v. Horn, 240 F.3d 239, 244 (3d Cir.) cert. denied, 534 U.S. 944 (2001).

Petitioner argues that he is entitled to equitable tolling of the pertinent time periods. It is clear that equitable tolling principles can, in some circumstances, extend both the time for filing a PCRA under Pennsylvania law, and the time for filing a federal habeas corpus petition.

The issue is whether petitioner has shown that the respondents or those for whom they are responsible improperly

interfered with, and frustrated, petitioner's efforts to challenge his conviction.

Petitioner has produced evidence establishing that, at one point during the one-year period after his conviction became final, there was a lock-down at the institution in which he was confined. All prisoners were locked in their cells, and, according to petitioner, all of his legal papers were confiscated and, ultimately, destroyed. He made repeated efforts to obtain the records which he needed to pursue his PCRA petition (trial transcripts, etc.) but without success.

The PCRA court and the Pennsylvania Superior Court found, however, that, even after making due allowance for these difficulties, the PCRA petition was still untimely. These courts concluded that the lock-down was relatively brief, and that the impediments to petitioner's PCRA filing had been removed more than 60 days before he actually filed the PCRA application. (Under the state statute, tolling does not extend the filing period beyond 60 days after removal of the impediment.)

The state courts have found that the PCRA petition was untimely, even allowing for permissible tolling. This court is bound by that determination, and cannot now second-guess the state courts' ruling that the PCRA application was filed too late. Thus, under state law, it was untimely, and the period

during which the PCRA application was pending in the state court does not toll the ADEA's one-year limitations period.

Presumably, however, as a matter of federal law, in applying the AEDPA, this court must make its own determination as to whether petitioner is entitled to equitable tolling during the period when the state courts were considering whether or not the PCRA application was timely. It would seem that there can be some circumstances in which it would be inequitable to withhold the benefits of equitable tolling from a petitioner who reasonably and in good faith believed that his PCRA application was timely, only to learn, too late, that the state court felt otherwise.

Be that as it may, this case must be decided on its own facts. As the report of Magistrate Judge Welsh convincingly demonstrates, this petitioner could readily have filed a PCRA petition within the time limit, and could have sought the aid of the court in obtaining whatever records might ultimately be needed. The grounds alleged in the original and amended petitions were within petitioner's knowledge at all times. There is no suggestion that anyone for whose conduct the respondents are responsible led petitioner to believe that he could not file an adequate application for judicial relief on the basis of the information already at his disposal.

I conclude, therefore, that the magistrate judge has correctly recommended that equitable tolling be denied. The petition will be dismissed.

Although directed by the magistrate judge to file a complete and detailed response to the petition, the respondents have not addressed the merits in any respect. Thus, while I agree with the magistrate judge on the timeliness issue, I do not believe it can confidently be asserted that the petitioner has failed to raise any substantial constitutional issue. I am inclined to believe that un-rebutted allegations of trial errors of potentially constitutional magnitude should have some bearing upon the certification issue. I prefer to allow the Court of Appeals to address that issue.

An order follows.

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ORDER

AND NOW, this day of May 2004, upon consideration of the amended petition for writ of habeas corpus, the response thereto, and the report and recommendation of United States Magistrate Judge Diane M. Welsh, IT IS HEREBY ORDERED:

1. The recommendation of the magistrate judge is APPROVED and ADOPTED.
2. The amended petition for writ of habeas corpus is DISMISSED, as untimely.
3. There may be grounds for the issuance of a certificate of appealability.
4. The court expresses appreciation to Peter Goldberger, Esquire for his commendable efforts on behalf of the petitioner, pursuant to court appointment.

John P. Fullam, Sr. J.